

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
FILED

MAR 27 2006

T.S. McGREGOR, CLERK
U.S. BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In Re:)	
GARLIZ INVESTMENTS, LLC,)	No. 04-08481-JAR11
Debtor(s).)	Adv. No. 05-80054-JAR
<hr/>		
GARLIZ INVESTMENTS, LLC; MANUEL)	
GARCIA and ESTER GARCIA,)	
Plaintiff(s),)	MEMORANDUM OPINION
vs.)	
BURGER KING CORPORATION,)	
Defendant(s).)	
<hr/>		

This matter came on for hearing on the 27th of June 2005 on the defendant's Motion to Dismiss Adversary Complaint or Alternatively, Motion to Transfer, filed on May 2, 2005. On June 22, 2005, the Court held a status conference and limited the scope of the June 27th hearing to the forum selection, jurisdiction and transfer issues. The Court has jurisdiction to hear this motion under 28 U.S.C. §157, 28 U.S.C. §1334 and its duty to determine its own subject matter jurisdiction. See e.g. In re Birting Fisheries, Inc. 300 B.R. 489 (9th Cir. BAP 2003).

MEMORANDUM OPINION - 1

MARCH 27, 2006

entered: 3/28/06

IDENTITY AND RELATIONSHIP OF THE PARTIES

2 The instant complaint was filed by Garliz Investments, LLC,
3 (Garliz) the debtor in the main case, and its principals and
4 guarantors Manuel and Esther Garcia (Garcias) against Burger King
5 Corporation. Pre-petition the Garcias formed the debtor Garliz
6 Investments, LLC for the purpose of entering into franchise
7 agreements with Burger King. Garliz Investments, LLC had entered
8 into franchise agreements with Burger King, covering 27 Burger King
9 restaurants in Washington, Idaho and Oregon. The actions which
10 give rise to this complaint occurred pre petition.

PROCEDURAL HISTORY

12 On November 3, 2004 Burger King commenced an action against
13 Garliz and the Garcias (as guarantors) in the U.S. District Court
14 for the Southern District of Florida, seeking damages in the
15 approximate amount of \$2.1 Million for unpaid amounts due under the
16 franchise agreements. Garliz filed the instant bankruptcy petition
17 on November 18, 2004, before an answer was due to the Florida
18 complaint. The Garcias filed an answer and counterclaim including
19 a jury demand on January 7, 2005. The same day they filed a notice
20 of removal as to the Florida proceeding. That removal was
21 abandoned on February 25, 2005 and the proceeding was returned to
22 the Florida court. The Florida court reopened its case as to the
23 Garcias only, the automatic stay remaining in effect as to the
24 debtor. On February 8, 2005 Burger King filed a motion for relief
25 from stay (Doc #134) seeking among other things to "exercise its
26 rights with respect to franchise agreements... ." At the February

MEMORANDUM OPINION - 2

MARCH 27, 2006

1 25, 2005 hearing, the court denied the motion without prejudice,
2 conditioned upon continuing adequate protection payments being made
3 by Garliz. An order to this effect was entered on March 8, 2005.
4 That same day Burger King filed its proof of claim in the
5 underlying bankruptcy seeking the unpaid royalties sought in the
6 Florida action. This was nine days before the deadline to file a
7 proof of claim. Four days after that, on March 22, 2005 the
8 debtors filed the instant complaint objecting to the proof of claim
9 and seeking relief essentially identical to that sought by the
10 Garcias in their Florida counterclaim. The defendant Burger King
11 filed a motion to dismiss or transfer this adversary. The Court
12 has limited the scope of this Decision to the issue of transfer.
13 On August 19, 2005, subsequent to the hearing on this matter, in
14 open court this matter was converted from a case under Chapter 11
15 to one under Chapter 7 upon Garliz's motion. Anthony Grabicki was
16 appointed the Chapter 7 trustee.

LEGAL ISSUES

18 This adversary proceeding was brought by the Debtor Garliz
19 Investments, LLC, and its principals Manuel and Esther Garcia. Its
20 first count seeks "complete setoff" against the claim filed by
21 Burger King based upon the damages resulting from the remaining
22 eight counts of the complaint: breach of the franchise agreements,
23 tortious interference with business relationship and expectancy,
24 breach of implied covenant of good faith and fair dealing,
25 intentional misrepresentation/fraud/deceit, negligent
26 misrepresentation, Franchise Investment Protection Act violation.

MEMORANDUM OPINION - 3

28 MARCH 27, 2006

1 Consumer Protection Act violation, and promissory estoppel. Among
2 other relief sought Burger King seeks to have this adversary
3 proceeding transferred to the Southern District of Florida.

CORE OR NON-CORE?

5 Bankruptcy Courts are courts of limited jurisdiction. They
6 exercise such jurisdiction as is granted to them by Congress, but
7 within the constraints provided in the United States Constitution.

8 Congress has provided that the district courts have "original
9 and exclusive jurisdiction of all cases under title 11." 28 U.S.C.
10 § 1334(a). The district courts have "original but not exclusive
11 jurisdiction of all civil proceedings arising under title 11, or
12 arising in or related to cases under title 11." 28 U.S.C.
13 §1334(b).

14 Congress has given the district court the authority to refer
15 "any or all cases under title 11 and any or all proceedings arising
16 under title 11 or arising in or related to a case under title 11"
17 to the bankruptcy judges. 28 U.S.C. §157(a). The District Court
18 for the Eastern District of Washington has made such a reference in
19 its Local Rule 83.5.

20 The bankruptcy judges may hear and decide by final order or
21 judgment "all cases under title 11 and all core proceedings"
22 "arising under" or "arising in" a case under title 11. 28 U.S.C.
23 §157(b)(1). These final orders or judgments are subject to appeal
24 to the district court or to the bankruptcy appellate panel
25 established by the circuit. 28 U.S.C. §158.

²⁶ Although a bankruptcy judge "may hear a proceeding that is not

MEMORANDUM OPINION - 4

MARCH 27, 2006

1 a "core" proceeding but that is otherwise "related to" a case under
2 title 11," it may not make a final order or judgment unless all
3 parties consent. 28 U.S.C. §157(c). Absent such unanimous
4 consent, the bankruptcy judges must make proposed findings of fact
5 and conclusions of law to be reviewed de novo by the district judge
6 upon timely objection. 28 U.S.C. §157 (c)(1).

7 This complicated jurisdictional grant was enacted to deal with
8 the problems created when the United States Supreme Court
9 invalidated the much broader jurisdictional grant enacted in the
10 Bankruptcy Code of 1978. Northern Pipeline Construction Co. v.
11 Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed 2d 598
12 (1982).

13 In the Marathon case, a Chapter 11 debtor had sued Marathon in
14 bankruptcy court for breaches of contract and warranty,
15 misrepresentation, coercion and duress. Marathon sought dismissal
16 of the adversary proceedings on the grounds that the Bankruptcy
17 Code of 1978 unconstitutionally conferred Article III judicial
18 power upon bankruptcy judges who lacked life tenure and protection
19 against salary diminution. The Supreme Court sustained Marathon's
20 objection to the constitutionality of the broad jurisdictional
21 grant of the 1978 Code. The Court found the causes of action in
22 Northern Pipeline's adversary proceeding involved rights created by
23 state law, independent and antecedent to the bankruptcy case.
24 Those rights could not be finally adjudicated by judges not cloaked
25 in the full protections provided for judges in Article III of the
26 United States Constitution. Thus adversary proceedings that were
27

28 **MEMORANDUM OPINION - 5**

MARCH 27, 2006

1 merely "related to" a bankruptcy case could not be finally
2 adjudicated by non-Article III bankruptcy judges.

3 Congress responded to this problem in 1984 by adopting the
4 current jurisdictional scheme contained in 28 U.S.C. §1334, 28
5 U.S.C. §157 and 28 U.S.C. §158 discussed above. It divides the
6 universe of bankruptcy court jurisdiction into two categories
7 "core" matters and "non-core" or "related to" matters.

8 Congress achieved this division by listing fifteen non-
9 exclusive examples of what it considered "core proceedings." 28
10 U.S.C. §157(b)(2)(A) through (O). Of these examples, four are
11 arguably applicable to the case before us:

12 (A) matters concerning the administration of the estate;

13 (B) allowance or disallowance of claims against the estate

14 . . .

15 . . .

16 (C) counterclaims by the estate against person filing claims
17 against the estate;

18 . . .

19 (O) other proceedings affecting the liquidation of the assets
20 of the estate or the adjustment of the debtor-creditor or the
21 equity security holder relationship, . . .

22 (A) and (O) are quite general in their scope while (B) and (C) are
23 specific. Courts have been reluctant to simply apply these
24 provisions broadly or literally because of the constitutional
25 questions posed by such approach.

26 The Ninth Circuit grappled with these issues in the case of

27 **MEMORANDUM OPINION - 6**
28 MARCH 27, 2006

1 Piombo Corp. v. Castlerock Properties, (In re Castlerock
2 Properties) 781 F.2d 159 (9th Cir. 1986). Piombo was suing
3 Castlerock in state court. Castlerock filed bankruptcy. Piombo
4 sought stay relief. Castlerock answered the stay relief request
5 incorporating state law counterclaims against Piombo. Piombo
6 objected to trial of the counterclaims against it in the stay
7 relief proceeding. The bankruptcy court denied Piombo's
8 objection. Piombo then answered the counterclaim and filed a Proof
9 of Claim. At the pretrial conference, Piombo objected to the
10 bankruptcy court's jurisdiction citing Marathon. This objection
11 was denied and the bankruptcy judge tried the case and entered
12 judgment against Piombo on the counterclaims. Piombo appealed and
13 the district court ruled that the bankruptcy court lacked
14 jurisdiction to decide the state law counterclaim issues. The
15 issue before the Ninth Circuit was . . . "[W]hether, under the 1984
16 Act, the bankruptcy court had jurisdiction to enter final judgment
17 on Castlerock's state law counterclaims." 781 F.2d 159, 161.

18 The Circuit court analyzed the issues as follows:

19 28 U S C § 157(b)(2), which enumerates the proceedings
20 designated as "core" consists of two "catch-all
21 provisions, §157(b)(2)(A) and (O) and a list of more
22 specific provisions. §157(b)(2)(B) - (N). The only one of
23 the specific provisions which might apply to Castlerock's
24 counterclaims is section 157(b)(2)(C), "counterclaims by
25 the estate against persons filing claims against the
26 estate." However, it seems unfair under the facts of
27 this case to categorize the counterclaims as falling
28 within this provision. The counterclaims were asserted
before the Proof of Claim was filed. Piombo would not
have filed the Proof of Claim if the bankruptcy court had
declined jurisdiction over the counterclaims. Nor are we
persuaded that they fall within either of the catch-all
provisions, "matters concerning the administration of the
estate," § 157(b)(2)(A) or "other proceedings affecting

MEMORANDUM OPINION - 7

MARCH 27, 2006

1 the liquidation of the assets of the estate." §
2 157(b)(2)(O). State law contract claims that arguably
3 fall within these catch-all provisions have been held to
4 be "noncore" "related proceedings" under §157(c).

5 . . . (citations omitted)

6 Accordingly, we hold that state law contract claims that
7 do not specifically fall within the categories of core
8 proceedings enumerated in 28 U.S.C. § 157(b)(2)(B)-(N) are
9 related proceedings under § 157(c) even if they arguably
10 fit within the literal wording of the two catch-all
11 provisions, sections § 157(b)(2)(A) and (O). To hold
12 otherwise would allow the bankruptcy court to enter final
13 judgments that this court has held unconstitutional.
14 Since we find the case before us a "related proceeding"
15 the district court was correct in ruling that the
16 bankruptcy court had no jurisdiction to enter judgment.
17 28 U.S.C. § 157(c)(1).

18 781 F.2d 159, 161-162.

19 Castlerock then argued that even if the counterclaims were
20 "related to" matters Piombo had consented to bankruptcy
21 jurisdiction when it filed its counterclaim relying on 28 U.S.C. §
22 157(c)(2). The court rejected this argument saying:

23 Castlerock relies on well-settled law that a creditor
24 consents to jurisdiction over related counterclaims by
25 filing a proof of claim. However, Castlerock cites no
26 case in which the filing of the proof of claim followed
27 the bankruptcy court's assertion of jurisdiction over the
28 counterclaims despite objections from the creditor. The
purpose of the rule, to prevent a bankruptcy trustee from
having "to split a cause of action by defending against
the claim in the summary proceedings and then seeking
affirmative relief in a plenary suit," is not served by
forcing the creditor to file a proof of claim as a
defensive maneuver, thereby conferring jurisdiction on
the bankruptcy court. Asserting an affirmative defense
does not constitute consent. By analogy, Piombo/s filing
the proof of claim should not be deemed consent.

29 781 F.2d 159, 162-163.

30 In dealing with these issues the Ninth Circuit observes, "[W]e
31 are persuaded that a court should avoid characterizing a proceeding
32 as 'core' if to do so would raise constitutional problems." 781

33 **MEMORANDUM OPINION - 8**

34 MARCH 27, 2006

1 F.2d 159, 162.

2 The Ninth Circuit appeared to have dramatically limited the
3 scope of its ruling in Castlerock when it decided Benedor Co. v.
4 Conejo Enterprises Inc., 71 F. 3d 1460 (9th Cir. 1996). (Herein
5 after referred to as Conejo I.) Benedor and Conejo allegedly
6 entered into a contract wherein Conejo was obligated to deliver its
7 "green waste" to Benedor and pay Benedor for disposal. Conejo
8 refused to deliver pursuant to this contract, and Benedor sued in
9 state court. Conejo filed for Chapter 11 relief and removed the
10 state court action to bankruptcy court. Benedor requested that the
11 bankruptcy abstain from hearing the state court action and grant
12 relief from stay so that action could proceed in state court. The
13 bankruptcy judge denied both of Benedor's motions, reasoning if
14 Benedor filed a proof of claim the state action would be a core
15 proceeding and therefore not subject to mandatory abstention and
16 conversely, if Benedor didn't file a proof of claim the claim would
17 be discharged and there would be no need for a state court trial.
18 Benedor appealed to the district court and on the day of hearing
19 that appeal filed its proof of claim (the last day for filing one.)
20 The district court ruled that the state action was non-core and
21 therefore subject to mandatory abstention, thus the stay should be
22 lifted. Conejo appealed.

23 The majority of the Circuit's panel found that "[I]n cases in
24 which a creditor files a proof of claim seeking allowance of that
25 claim, core jurisdiction arises." 71 F.3d at 1466. The majority
26 limited Castlerock to its "unique facts" over the dissent of Judge

27 **MEMORANDUM OPINION - 9**
28 MARCH 27, 2006

1 Fletcher, the author of Castlerock, who observed that the decision
2 unnecessarily put Benedor in a "Kafkaesque position". 71 F.3d at
3 1468.

4 This ruling was not the end of those issues in this case.
5 Less than nine months later, the panel revisited the case and
6 withdrew its previously published opinion (Conejo I) in Benedor
7 Corp v. Conejo Enterprises, Inc. 96 F. 3rd 346 (9th Cir. 1995)
8 (hereinafter referred to as Conejo II.) This withdrawal of the
9 published opinion was triggered by the Supreme Court's opinion in
10 Things Remembered, Inc. v. Petrorca, 516 U. S. 124, 116 S.Ct. 494,
11 133 L.Ed 2d 461 (1995) which held that under the relevant statute
12 "an appellate court does not have jurisdiction to review a district
13 court's order remanding a case to state court." 96 F.3d at 350.
14 In the course of vacating its opinion it discussed its previous
15 ruling on whether filing of a claim converted a state claim into a
16 core matter:

17 In our published opinion, we held that Benedor's filing
18 of the claim in bankruptcy rendered the state law action
a core proceeding. In doing so, we were in error.

19 While there can be no serious dispute that claims filed
20 in bankruptcy are within the bankruptcy court's core
jurisdiction, the filing of a claim does not consolidate
21 it with the pending state law case (into the claim) even
though they are based on the same transaction. Both
22 continue to exist, and must be considered, separately.
23 96 F.3d at 349.

24 Despite ruling that the district court's ruling that the bankruptcy
25 court should have abstained was not appealable, the court felt the
26 issue as to whether the stay should be lifted should be remanded to
27 the bankruptcy court in light of the fact that a claim had now been
28

MEMORANDUM OPINION - 10
MARCH 27, 2006

1 filed. The majority opinion suggests the bankruptcy court was
2 within its discretion when it refused to lift the stay citing a
3 desire to keep the "playing field level" in the negotiation
4 process. 96 F.3d at 353. Judge Fletcher dissented in part
5 questioning whether the creditor should be held hostage for the
6 common good and citing Marathon concerns. 96 F.3d 355.

7 The Ninth Circuit revisited the issue again in Conejo III.
8 In re G.I. Industries, Inc., 204 F.3rd 1276 (9th Cir. 2000). In
9 this case Conejo's trustee rejected Conejo's executory contract
10 with Benedor. Benedor then filed a proof of claim for damages
11 arising from the rejection of the contract. The trustee objected
12 to the proof of claim arguing that the contract was unenforceable
13 under state law. After a trial the bankruptcy court found the
14 contract unenforceable and denied the claim. Benedor appealed
15 arguing the bankruptcy court lacked jurisdiction to consider the
16 validity of the contract. The Court of Appeals ruled that the non-
17 core state breach of contract issue was subsumed in the claims
18 allowance process and thus was within the bankruptcy court's
19 jurisdiction.

20 What rules are to be drawn from this intricate judicial
21 tapestry? A court should avoid characterizing a proceeding as
22 "core" if it would raise Marathon issues. Castlerock. The filing
23 of a proof of claim does not necessarily convert the underlying
24 state law dispute into a "core" proceeding. Conejo II. The
25 bankruptcy court may decide state law issues in the claims
26 allowance process. Conejo III.

27
28 **MEMORANDUM OPINION - 11**
MARCH 27, 2006

1 These issues were confronted again in the case of In re
2 Marshall, 264 B.R. 609 (C.D. Cal. 2001). This was an appeal to the
3 district court from a decision of the bankruptcy court. In re
4 Marshall, 257 B.R. 35 (Bkrcy C.D. Cal. 2000). A creditor had filed
5 an adversary proceeding objecting to the discharge of the creditors
6 defamation claim against the Debtor. The creditor subsequently
7 filed a proof of claim in the Debtor's bankruptcy case. The
8 Debtor counterclaimed against the creditor for tortious
9 interference with an expectation of inheritance. A trial was held
10 before the bankruptcy court at which the Debtor prevailed both on
11 the defamation and the tortious interference claims. The creditor
12 objected that the probate exemption barred jurisdiction over the
13 interference with expected inheritance counterclaim. The
14 bankruptcy court rejected the creditors arguments. It held that
15 the creditor had consented to bankruptcy court jurisdiction when he
16 filed his proof of claim, that the issues before the court were
17 "core" matters, and it issued a final judgment in favor of the
18 Debtor. The Creditor appealed to the district court.

19 The district court found that the probate exemption to
20 bankruptcy jurisdiction did not apply. It then examined the core
21 versus non-core distinction. 264 B.R. 625-632. Although the
22 counterclaim before the court fell within the literal wording of
23 28 U.S.C. §157(b)(2)(c), considering the Marathon/Castlerock
24 implications, the court concluded it was a non-core "related to"
25 proceeding saying in part:

26 When a counterclaim is only somewhat related to the claim
27 against which it is asserted, and when the unique
28

MEMORANDUM OPINION - 12
MARCH 27, 2006

1 characteristics and context of the counterclaim place it
2 outside of the normal type of set-off or other
3 counterclaims that customarily arise, thus rendering the
efficiency concerns not at issue, the counterclaim should
not be characterized as core.

4 264 B.R. at 632.

5 Pursuant to this ruling the district court vacated the
6 bankruptcy court's judgment on the counterclaim and conducted its
7 own de novo review.¹

8 As the court in In re Marshall recognized, the issues
9 presented in our case are close issues over which reasonable minds
10 could differ. The complaint asserts nine causes of action, only
11 one of which arises under Title 11 and that is the debtor's
12 objection to Burger King's proof of claim. The remaining eight
13 causes of action do not arise under or in Title 11 but are causes
14 of action based in state law that exist independently of Title 11:
15 breach of contract, tortious interference with a business
16 relationship, breach of implied covenant of good faith and fair
17 dealing, intentional misrepresentation or fraud, negligent

18 _____
19 ¹

20 After conducting its de novo review, the district court ruled in
21 favor of the debtor and against the creditor on the interference
22 with an expectancy of inheritance counterclaim and adopted the
bankruptcy court's proposed findings and conclusions as modified,
and entered judgment against the creditor on the counterclaim.
23 Both parties appealed and the Ninth Circuit reversed on the ground
that the probate exclusion to federal jurisdiction applied in this
24 bankruptcy matter. In re Marshall, 392 F.3d 1118 9th Cir. (2004).
The court did not reverse the district court decision that the
matter was a "non-core" "related to" issue. The Ninth Circuit
25 decision has been appealed to the United States Supreme Court and
that court granted certiorari. Marshall v. Marshall, ____ U.S. ____,
26 126 S.Ct. 35, 162 L.Ed 2d 933 (9/27/05). The case has
been argued and is awaiting decision.

27 **MEMORANDUM OPINION - 13**

28 MARCH 27, 2006

1 misrepresentation, violation of the Franchise Investment Protection
2 Act, violation of the Consumer Protection Act and promissory
3 estoppel. These causes of action fall within the literal language
4 of 28 U.S.C. § 157 (b) (2) (C) which provides that 'counterclaims by
5 the estate against persons filing claims against the estate,' are
6 included in core proceedings. As we have seen, a number of cases
7 have concluded that even if certain causes of action are
8 counterclaims within the language of 28 U.S.C. § 157(b) (2) (C), they
9 are nevertheless non-core. Here, the proof of claim appears to
10 have been filed defensively, as the original claim for these
11 amounts due was made pre-petition in the Florida action. The
12 creditor did seek relief from stay in one form or another prior to
13 filing its proof of claim and is now seeking to have its rights
14 determined in the original forum it brought suit. The debtor's
15 counterclaims are unarguably compulsory as they arise out of the
16 same transactions as the debtor's claims for money, the franchise
17 agreements and resulting relationship. Considering all of these
18 facts, it is this court's ruling that the debtor's objection to the
19 proof of claim is "core" and the remaining causes of action
20 contained within the complaint are non-core "related to" matters.

21 The court having concluded that the complaint and answer
22 herein contain almost exclusively non-core related to causes, must
23 decide now which court is the more appropriate forum to hear and
24 enter judgment on those claims. This court does not possess
25 exclusive jurisdiction over these claims as indicated in 28 U.S.C.
26 §1334. In fact a federal district court enjoys the same power over
27

28 **MEMORANDUM OPINION - 14**

MARCH 27, 2006

1 everything up to and included 'cases under title 11.' 28 U.S.C.
2 §1334(a). The court also notes that although the non-core
3 determination is vital to any discussion of bankruptcy court
4 jurisdiction, it is not outcome determinative as to which
5 particular forum is the most appropriate. Burger King has argued a
6 number of basis to transfer this proceeding to the Florida
7 district court.

8 **FORUM SELECTION CLAUSE**

9 Each of the franchise agreements entered into contained a
10 similar forum selection clause designating one of two courts in
11 Florida as the appropriate place to bring claims arising out of the
12 contract. Burger King seeks enforcement of that provision.

13 The law on forum selection clauses necessarily begins with the
14 U.S. Supreme Court's ruling in Bremen v. Zapata Off-Shore Co., 407
15 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972.). The Supreme Court in
16 Bremen indicated a strong federal endorsement of forum selection
17 clauses, ruling that freely negotiated forum selection clauses are
18 *prima facie* valid and are to be honored absent proof on the part of
19 the party seeking its non-enforcement of some countervailing reason
20 for non-enforcement such as: 1) fraud or overreaching, 2) strong
21 public policy in favor of another forum or 3) enforcement would be
22 so seriously inconvenient as to be unreasonable. The 9th Circuit
23 in Manetti-Farrow v. Gucci, 858 F.2d 509 (9th Cir. 1988) applied the
24 Bremen test and concluded that forum selection clauses would extend
25 even to tort causes of action if such tort analysis would involve
26 terms of the contract. The Supreme Court later in Carnival Cruise

27 **MEMORANDUM OPINION - 15**

28 MARCH 27, 2006

1 Lines v. Shute, 499 U.S. 585 (1991) extended the Bremen reasoning
2 to form contracts, for which the forum selection clause was not
3 freely negotiated, recognizing the necessity for such to multi-
4 arena entities. Does any countervailing reason against enforcement
5 of the forum selection clauses exist in this case?.

6 **Fraud or Overreaching:** The debtor argues in its objection
7 that the fraud alleged in the complaint is a basis to invalidate
8 the forum selection clause, however fraud in the inducement or as
9 to other clauses is not sufficient to overcome a forum selection
10 clause and the debtor has not argued or pled that there was fraud
11 as to the inclusion of the forum selection clause itself. Stamm v.
12 Barclays Bank of New York, 960 F.Supp 724 (SDNY 1997); Argueta v.
13 Banco Mexicano, 87 F.3d 320 (9th Cir. 1996) at 325. The debtors
14 argument on this basis fails.

15 **Public Policy:** The debtor argues that the strong public
16 policy in favor of bankruptcy courts resolving claims against
17 bankrupt debtors overrides the forum selection clause in favor of
18 this court.

19 There are a number of bankruptcy court cases in which courts
20 have enforced forum selection clauses holding that the filing of a
21 bankruptcy petition should not over come Bremen's strong policy in
22 favor of forum selection clauses. Howard Steinberg 1 Bankruptcy
23 Litigation Sec 2:9. Most courts agree that if a matter is
24 "related to" a bankruptcy case and does not present any core
25 issues, that the forum selection clause should be enforced. This
26 rationale has also held true in arbitration clause cases even if

MEMORANDUM OPINION - 16
MARCH 27, 2006

1 one portion of the proceeding was core. MCI v. Gurga (In re Gurga)
2 176 B.R. 196 (9th Cir. BAP 1994). However, there is authority in
3 favor of retaining all core matters with the bankruptcy court,
4 without regard to forum selection clauses. There are also courts
5 which have fashioned remedies so as to retain the core causes of
6 action and allow the forum selection clause to be enforced as to
7 the non-core matters. In re Kamine/Besicorp Allegany, L.P., 214 B.R.
8 953 (Bkrtcy NJ 1997). The causes of action presented here arise
9 out of state law, were in fact asserted pre-petition, the creditor
10 has attempted to have them resolved in the Florida forum and is
11 seeking to return to that forum. The debtor's objection to the
12 creditor's claim is what ties the litigation to the bankruptcy
13 forum.

14 Admittedly there is a policy in favor of the bankruptcy court
15 hearing all matters relating to the bankruptcy case. In re Parent
16 Inc., 221 B.R. 609, 620 (Bkrtcy Mass.1998). However here the
17 original Chapter 11 reorganization case has been converted to a
18 chapter 7 case. The Chapter 7 trustee, Mr. Grabicki, has advised
19 in open court, that he has no objection to this adversary
20 proceeding being heard in the District Court in Florida. Given
21 that position, the argument based on favoring the single bankruptcy
22 fails in contest with the strong policy in favor of enforcement of
23 forum selection clause.

24 **Unreasonably inconvenient:** The third Bremen question is
25 whether requiring the parties to litigate in Florida is so
26 seriously inconvenient as to be unreasonable and deprive the party

27
28 **MEMORANDUM OPINION - 17**
MARCH 27, 2006

1 of its day in court. There are essentially three parties to this
2 proceeding: the debtor (a Washington corporation), Burger King (a
3 Florida corporation) and the Garcias (residents of Idaho). Two of
4 these parties are already involved in litigation in Florida, Burger
5 King and the Garcias, necessitating travel to Florida. The debtor
6 was involved in that litigation until the bankruptcy was filed.
7 Each of these litigants were parties to the contract containing the
8 forum selection clause, so their convenience is of less relevance
9 in contrast to other factors to be weighed. Manetti-Farrow, 858
10 F.2d 509 (9th Cir. 1988). The 11th Circuit has held that merely the
11 fact of greater expense to one party over the other does not meet
12 the grave inconvenience required by Bremen's unreasonableness
13 standard. Steward v. Ricoh, 810 F. 2d 1066 (11th Cir. 1987). The
14 issues presented here are virtually identical to what is in the
15 Garcias' counterclaim against Burger King in Florida. Burger King
16 lists fourteen witnesses in Florida, the debtor has not indicated
17 as many are in Washington. Debtor's trial counsel is also located
18 in Florida. The debtor argues that it will be inconvenient for its
19 witnesses and principals to travel to Florida for the litigation,
20 however the Garcias (presumably the persons with the most relevant
21 information) will already be traveling from Idaho to Florida
22 because of the litigation proceeding there. Further factors of
23 judicial economy weigh in favor of allowing the proceeding to be
24 litigated in Florida. The United States District Court in Florida
25 can enter a final judgment on the non-core issues. An appeal from
26 that decision would go to the Court of Appeals, eliminating one
27

28 **MEMORANDUM OPINION - 18**

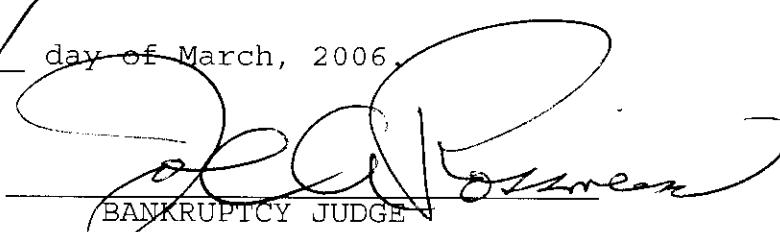
MARCH 27, 2006

1 court in the appeal process. Litigating these causes of action in
2 Florida is not so seriously inconvenient as to be unreasonable.

3 **CONCLUSION**

4 The court finds that the complaint contains one core cause of
5 action and the remaining causes of action are non-core "related to"
6 proceedings. The debtor has not overcome the strong presumption in
7 favor of enforcing the forum selection clause as to the non-core
8 matters. The court further concludes that it is most efficient to
9 lift the automatic stay to allow all the parties to proceed with
10 litigation of the "related to" causes of action in the United
11 States District Court in Florida. This adversary proceeding will
12 be stayed pending the completion of that litigation. At that time
13 the parties will return to this court for resolution of any pending
14 claim objection dispute.

15 DONE THIS 27 day of March, 2006.

16 
17 John P. O'Sullivan

18 BANKRUPTCY JUDGE

19
20
21
22
23
24
25
26
27
28 **MEMORANDUM OPINION - 19**

MARCH 27, 2006